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HAROLD B. WILLEY,

No. 481

IN THE

Supreme Court of the United States

October Term, 1953

FLORIDA CITRUS COMMISSION, *et al., Appellants,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al., Appellees.*

Appeal From The United States District Court For The Southern District of Florida

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BRIEF FOR THE APPELLANTS

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	3
Statement	3
The Commission Proceedings	6
Orders Sought to be Annulled	11
The Commission Findings	12
Delivery at New York	12
Pier Delivery of Other Traffic	17
Delivery at Philadelphia	18
Specification of Errors	20
ARGUMENT	
Summary of Argument	22
The two Commission Reports	26
The Commission Erred in Disregarding the Obligation of the Railroads to Make Delivery Under their Line-Haul Rates	31
The Railroads Did Not Attempt to Show the Line-Haul Rates To Be Inadequate to Cover Delivery, and In Fact Contended That the Line-Haul Rates Are Irrelevant	39
The Commission Acted Arbitrarily in Approving a Discriminatory Treatment of the Fruit and Vegetable Traffic	45
The Commission's Final Report Reversed and Abandoned the Grounds of Decision in the Original Report	50
The Commission's Final Report Plainly Shows the Erroneous Basis of the Decision	54
CONCLUSION	61
Appendix	65

CITATIONS

CASES: Page

Associated Jobbers of Los Angeles v. A., T. & S. F. Ry. Co., 18 I.C.C. 310 22
Atchison, T. & S. F. R. Co. v. United States, 295 U.S. 193 38
Atlantic Coast Line R. Co. v. Arcade & A. R. Corp., 194 I.C.C. 729 45
Charges for Loading and Unloading Carload Freight, 269 I.C.C. 25 59
Erie R.R. Co. v. A. & V. Ry. Co., 98 I.C.C. 268 45
Florida Citrus Commission, et al. v. The Baltimore and Ohio R. Co., et al., Docket 31105 11
Florida Citrus Commission, et al., v. The Baltimore and Ohio R. Co., et al., Docket 31106 11
Fruits and Vegetables to Duane St., N. Y., 66 I.C.C. 135 36
Increased Freight Rates, 1947, 269 I.C.C. 33; 270 I.C.C. 81; 270 I.C.C. 403 44
Increased Freight Rates, 1948, 272 I.C.C. 695; 276 I.C.C. 9; 279 I.C.C. 303 57
Increased Freight Rates, 1951, 280 I.C.C. 179; 281 I.C.C. 557; 284 I.C.C. 589; 289 I.C.C. 395 44
Interstate Com. Com. v. Atchison, T. & S. F. Ry. Co., 234 U.S. 294 29
Lighterage and Storage Regulations at New York, 35 I.C.C. 47 36
Loading and Unloading Carload Freight, 101 I.C.C. 394 60
New England Coal & Coke Co. v. N. & W. Ry. Co., 33 I.C.C. 276 60
Swift & Co. v. United States, 343 U.S. 373 58
Terminal Charges at Pacific Coast Ports, 255 I.C.C. 673 37
United States v. American S. & T. Plate Co., 301 U.S. 402 22
United States v. Baltimore and Ohio R. Co., 333 U.S. 169 48
United States v. United Smelting, R. & M. Co., 339 U.S. 186 45
Unloading Charges on Fresh Fruits and Vegetables at New York and Philadelphia, 272 I.C.C. 648; 286 I.C.C. 119 .....3, 5, 6, 9
Unloading Lumber at New York Harbor, 256 I.C.C. 463 35

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Page

STATUTE:

Interstate Commerce Act, as amended (24 Stat. 379, as amended; 49 U.S.C., Sec. 1 *et seq.*):
1(3) 3
1(5) 3
1(5) 3, 47, 48
2 ..... 3, 47
3(1) 3, 32
6(1) 3
6(7) 3
15(2) 3, 44, 45, 57
15(6) 2, 3, 20, 25, 42
15(7) .....

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BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the three-judge statutory District Court (R. 204, 208) is reported at 114 F. Supp. 420.

JURISDICTION

This is an appeal from a decision of a three-judge statutory District Court dismissing a complaint seeking to have orders of the Interstate Commerce Commission enjoined,

annulled and set aside. The final judgment of the District Court was entered August 31, 1953 (R. 203) and the petition for appeal was presented to the District Judge and allowed on October 28, 1953. (R. 220) The jurisdiction of this Court to review the judgment of the District Court by direct appeal is conferred by 28 U.S.C. Supp. V, Sections 1253 and 2101(b).

QUESTIONS PRESENTED

1. May the Interstate Commerce Commission disregard the universal obligation of the railroads under their line-haul rates to make delivery of freight to consignees and in disregard thereof authorize an extra charge in addition to the line-haul rates for such delivery without having determined or found that the line-haul rates (a) do not include delivery or (b) are inadequate to compensate the railroads for performing their customary obligation?

2. Where the railroads have chosen, as at New York, N. Y., not to provide team-track terminal facilities, which are customarily provided as public terminals for the delivery of carload freight, but have chosen in lieu thereof to employ pier stations, are the railroads discharged from their obligation to make delivery under their line-haul rates?

3. Where the railroads have for more than 50 years made delivery of fruit and vegetable traffic at their pier stations in New York under their line-haul rates (including performance of unloading of cars which is essential to make the freight accessible to consignees and accomplish delivery), is the Commission not duty-bound by the provisions of Section 15(7) of the Interstate Commerce Act to require railroads proposing an additional charge for delivery to sustain "the burden of proof" of showing that their line-haul rates (a) do not cover delivery or (b) are inadequate to cover such service; and in the absence of such a showing, and Commission findings that

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such showing has been made, is the Commission not required to find the additional charge unjustified and order it canceled?

4. Was the Commission's action arbitrary in authorizing a charge in addition to the line-haul rates for the delivery of fruit and vegetable traffic at the railroad pier stations when the railroads make delivery of all other kinds of carload freight at these stations at their line-haul rates without extra charge, the Commission having found that the physical method of handling, including unloading of cars, is identical as to all traffic?

5. Did the Commission act arbitrarily and contrary to the Interstate Commerce Act in authorizing unloading charges at New York and Philadelphia on fruits and vegetables in addition to the line-haul rates, when no such charges are assessed at any other point except where the consignee elects to request carrier unloading as a special additional service beyond delivery?

STATUTE INVOLVED

Sections 1(3)(a), 1(5), 2, 3(1), 6(1)(7), 15(6), 15(7), and 15a(2), as amended, of the Interstate Commerce Act are set forth in Appendix A hereto.

STATEMENT

For over 50 years, since "the latter part of the nineteenth century," the railroads serving New York, N. Y., "have concentrated their [fresh] fruit and vegetable deliveries" at pier stations voluntarily established and maintained by them on Manhattan Island. (R. 23e, 286 I.C.C., p. 122)* At Philadelphia deliveries were concentrated at

* The quoted material is from the report of the Interstate Commerce Commission here under review, *Unloading Charges on Fresh Fruits and Vegetables at New York and Philadelphia*, 286 I.C.C. 119, or from a prior report in the same proceeding, 272 I.C.C. 648. (R. 24)

the produce terminal station of the Pennsylvania Railroad. (R. 23r, 286 I.C.C., p. 134) "Through rates apply on fresh fruits and vegetables, in carloads, from points in the various producing areas throughout the country to stations in New York and Philadelphia." (R. 23b, 286 I.C.C., p. 120)

In making deliveries of the fresh fruit and vegetable traffic at the pier stations in New York and at the produce terminals in Philadelphia, the railroads unload the cars and move the freight to the places in their stations where the freight is delivered to the consignees. Prior to November 1, 1948, "there were no separate charges in addition to the through rates, for unloading fruits, vegetables, or other descriptions of traffic at the stations specified. The charges which became effective on that date apply only on fresh fruits and vegetables" and not on other traffic. (R. 23c, 286 I.C.C., p. 121) "No charges such as those under consideration have applied on this traffic in the past." (R. 23b, 286 I.C.C., p. 120)

Effective November 1, 1948, for the first time the railroads provided charges in addition to their line-haul rates to New York and Philadelphia for the unloading and delivery of fresh fruits and vegetables, in carloads, at the pier stations in New York and at the railroad produce terminals in Philadelphia. The railroads deny to the consignees any opportunity to unload their freight at these stations and insist upon performing the unloading themselves. The new charge assessed in addition to the line-haul rates covers unloading and delivery of the freight. "*Under their proposal the line-haul rate will apply only to the New York piers, with an additional charge for unloading the freight and placing it on the pier platform where the consignee can accept delivery.*" (R. 23e, 286 I.C.C., p. 123) "Respondents' proposal would, however, tend to split the New York metropolitan area by making delivery without extra charge therefor at team tracks on the New Jersey side of the Hudson River *while assessing a charge, in addi-*

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tion to the line-haul rate, for making delivery at New York piers." (R. 23m, 286 I.C.C., p. 129) At Philadelphia the consignee is denied delivery at the produce terminal unless he orders the freight unloaded by the carrier and pays the so-called "unloading" charge in addition to the line-haul rate. (R. 23s, 286 I.C.C., p. 134)

The shippers and receivers and public bodies protesting against the proposed charge contended that it represented a charge for a delivery service which has been and is included in the line-haul rate, such service having been performed without charge in addition to the line-haul rates for more than 50 years and being a service which the carriers are customarily required to perform under their line-haul rates. "On behalf of the city [of New York], it is argued that the unloading service at the piers is an integral part of the movement of the traffic from origin to ultimate destination, for which the charge is included in the line-haul rate, and that for this service, which has been performed by the carriers without extra charge, for more than 50 years, no additional charge is warranted." (R. 23m, 286 I.C.C., p. 129)

The charge in addition to the line-haul rates was made effective after the first report of the Commission in I. & S. Docket 5500, *Unloading Charges, Fruits and Vegetables, N. Y. and Phila.* 272 I.C.C. 648, decided October 4, 1948. (R. 24) Following reopening and two further hearings, the Commission in the further and final report here under review (286 I.C.C., p. 119, decided May 7, 1952; R. 23) found the charges originally approved by it and made effective by the railroads to be "not shown to be just and reasonable" and ordered the charges canceled "without prejudice to the establishment of charges in conformity with the views expressed herein." In its final report the Commission authorized and approved the establishment by the railroads of charges in addition to their line-haul rates for the unloading and delivery service on a substantially lower level than those originally authorized. The lower extra

charges were established by the railroads at New York effective July 3, 1952, and at Philadelphia August 1, 1952. (R. 31, 37) Complaints were filed by plaintiffs and intervening plaintiffs against these charges shortly thereafter. These complaints were dismissed by the Commission upon motion without hearing on the ground that the complaints assailed charges approved by the Commission in its report of May 7, 1952, *Unloading Charges on Fruits and Vegetables, N. Y. and Phila.*, 286 I.C.C. 119. (R. 26)

The Commission Proceedings.

By tariffs filed to become effective June 1, 1947 the railroads proposed charges to be assessed in addition to their line-haul rates for unloading the fruit and vegetable traffic and making delivery at New York and Philadelphia. (R. 24a, 272 I.C.C., p. 648; R. 23a, 286 I.C.C., p. 123). Upon protests of "numerous shippers and shipper organizations, State commissioners, The Port of New York Authority, and other interests" the operation of the tariffs was suspended and the Commission instituted an investigation into the lawfulness of the proposed charges. (R. 24a, 272 I.C.C., p. 649) Following hearing and two oral arguments the Commission issued its first report dated October 4, 1948, *Unloading Charges, Fruits and Vegetables, N. Y. and Phila.*, 272 I.C.C. 648. (R. 24, *et seq.*) In this report the Commission, with four Commissioners dissenting, found "that the schedules under investigation are just and reasonable. An order will be entered vacating the order of suspension and discontinuing this proceeding." (R. 24r, 272 I.C.C., p. 663) Unloading charges were thereupon established by the railroads in uniform amounts at New York and Philadelphia, effective November 1, 1948, in the following amounts:

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	Per Net Ton
Citrus fruits	$1.95
Fresh fruits (other than citrus)	2.28
Melons (including cantaloupes)	2.60
Vegetables, fresh or green, not coldpack or frozen	1.95
Vegetables, fresh or green, not coldpack or frozen, when top icing or body icing is used	2.60

(R. 23b, 286 I.C.C., p. 120)

These charges approximated "the claimed average costs of unloading the several groups of commodities." (R. 23c, 286 I.C.C., p. 121) The amounts above shown, made effective November 1, 1948, were 30 percent greater than the railroads originally proposed, the increase being in conformity with a general increase in all railroad rates and charges authorized by the Commission as of October 6, 1947. (R. 23b, 286 I.C.C., p. 120)

"Upon petitions for reopening and reconsideration by the Florida Railroad and Public Utilities Commission, the California Citrus League, The Port of New York Authority, the Secretary of Agriculture, the Philadelphia Terminals Marketing Association, and others, the proceeding was reopened for rehearing" (R. 23a, 286 I.C.C., pp. 119-120) by order dated June 9, 1949. (R. 292) A rehearing was had following which the two hearing examiners issued a proposed report recommending that the Commission find the "charges assailed for unloading fresh fruits and vegetables, in carloads, at New York and Philadelphia are unjust and unreasonable, and that the findings in the prior report herein should be reversed. The schedules naming the unloading charges assailed should be ordered canceled and the proceeding discontinued." (R. 80)

On July 24, 1950 the Commission heard oral argument on the report of the examiners and exceptions filed by respondent railroads thereto. No report or decision was is-

sued at that time; but on October 10, 1950, a "Notice" was issued "By the Commission," reading (R. 293):

> "Upon further consideration of the record in the above-entitled proceeding, it appears that the record is deficient in respect of certain evidence which seems to be important, and the proceeding will be assigned for further hearing.
>
> "At this further hearing, in addition to other evidence which they may deem appropriate, respondent railroads will be expected to present evidence to show the difference in costs to them of handling fruits and vegetables, in carloads, at piers on Manhattan Island as compared with the handling of carloads of fruits and vegetables at railroad team tracks on Manhattan Island and Jersey City, N. J. Among other things, such evidence should show the difference in, and cost of, switching services required on cars accorded team-track delivery and any difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities. Also, to the extent that differences in costs exist at Philadelphia, as between carloads which are unloaded by respondents and those unloaded by shippers, respondents should submit similar evidence to show the amount of such differences. Protestants may also submit such further evidence as they deem appropriate.
>
> "The above-entitled proceeding will be assigned for further hearing at times and places hereafter to be announced."

Protestants, including certain of plaintiffs and intervening plaintiffs, filed with the Commission following issuance of said "Notice," petitions and motions for entry of order requiring cancellation of the tariffs. (R. 296-299, 311) The petitions and motions were denied by the Commission by order dated November 16, 1950. (R. 16, 179)

Further hearing was held in June, 1951, at which additional evidence was presented and in August, 1951, the examiner issued a "Second Report on Further Hearing" and recommended (R. 115-116):

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"Upon further hearing the Commission should find that the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are not shown to be just and reasonable, and that they are also in violation of Section 3(1) of the Act. The ultimate finding in the prior report should be reversed. The schedules naming these unloading charges should be ordered cancelled and the proceeding discontinued."

The fourth oral argument was heard by the Commission on September 26, 1951. Under date of May 7, 1952, the Commission issued its "Report of the Commission on Rehearing and Further Hearing," *Unloading Charges, Fruits and Vegetables, N. Y. and Phila.*, 286 I.C.C. 119. (R. 23) In this report the Commission, with Commissioners Splawn, Aitchison and Lee "concurring specially" and Commissioner Knudson dissenting, made the following ultimate finding (R. 23bb-23cc, 286 I.C.C., p. 142):

"Upon rehearing and further hearing, we find that the charges under consideration for unloading fruits and vegetables at New York and Philadelphia are not shown to be just and reasonable, and the schedules naming the assailed unloading charges will be ordered canceled and the proceeding discontinued without prejudice to the establishment of charges in conformity with the views expressed herein. The ultimate finding in the prior report is modified accordingly."

Issued with the report was order bearing the same date, May 7, 1952 (R. 25), which (1) required the railroads to cancel their established tariffs providing the unloading charges under investigation; (2) authorized and approved the establishment by the railroads of the lower charges stated by the Commission in its report; and (3) discontinued the proceeding. The said order of May 7, 1952 incorporated the report of May 7, 1952 and the prior report (R. 24, 272 I.C.C. 648), these reports being "referred to

and made parts hereof'' by the terms of said order. Under the terms of the said order and the reports incorporated therein, the Commission authorized and approved the ''establishment'' by the railroads at New York and Philadelphia of so-called unloading charges to be assessed in addition to the line-haul rates in the following amounts (R. 23bb, 286 I.C.C., p. 141):

	Per Net Ton
Citrus fruits	$1.05
Fresh fruits (other than citrus)	1.35
Melons (including cantaloupes)	1.65
Vegetables, fresh or green, not cold pack or frozen	1.05
Vegetables, fresh or green, not coldpack or frozen, when top icing or body icing is used	1.65

The above charges were established by the railroads, in lieu of their former charges, at New York effective July 3, 1952 and at Philadelphia effective August 1, 1952. (R. 31, 37)

Under date of September 16, 1952 certain of plaintiffs and intervening plaintiffs filed with the Commission a complaint assailing the unloading charges made effective *at New York, N. Y.*, on July 3, 1952, as ''unjust and unreasonable in violation of Section 1'' of the Interstate Commerce Act.* (R. 28) The City of New York and the Secretary of Agriculture intervened. (R. 1551) A similar complaint was filed with the Commission on September 23, 1952 making substantially the same allegations concerning the unloading charges at *Philadelphia, Pa.*, by most of the same

* Complainants were Florida Citrus Commission, Growers and Shippers League of Florida, California Citrus League, California Grape and Tree Fruit League, United Fresh Fruit and Vegetable Association, and The Port of New York Authority. The complaint was designated Docket No. 31105.

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complainants.* (R. 35) By identical motions the defendant railroads moved the Commission to dismiss these complaints on the ground that the charges assailed had been specifically authorized and approved by the Commission in its report of May 7, 1952. (R. 1541-1546) These motions were granted and the complaints were dismissed by order dated December 15, 1952. In this order the Commission recited that the unloading charges assailed were those "stated in the findings" in the report of May 7, 1952 and that such charges had been "*approved in said report.*" It also recited "that the circumstances and conditions with respect to the *approved* unloading charges have not materially changed since substantially the same issues were decided by the Commission." (R. 26)

Orders Sought to be Annulled.

The Court is asked to enjoin, suspend, set aside and annul two orders of the Commission, namely:

First, that portion of the order of May 7, 1952 authorizing and approving the establishment and maintenance by the railroads at New York, N. Y., and Philadelphia, Pa., of unloading charges on shipments of fruits and vegetables in addition to their line-haul rates, issued in I. & S. Docket 5500, *Unloading Charges on Fruits and Vegetables at New York and Philadelphia* (R. 25); and

Second, the order of December 15, 1952 ratifying and reaffirming the authorization and approval of the said unloading charges, issued in, and dismissing without hearing the complaints in, Docket 31105, *Florida Citrus Commission, et al.* v. *The Baltimore and Ohio R. Co., et al.*, and Docket 31106, *Florida Citrus Commission, et al.* v. *The Baltimore and Ohio R. Co., et al.* (R. 26)

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* The complainants were the same except that The Port of New York Authority was not a party and the following two additional complainants were added: Philadelphia Terminals Marketing Association and Auction Receivers of Philadelphia. This second complaint was designated Docket No. 31106.

The Commission Findings.

The report of the Commission under review (R. 23, 286 I.C.C. 119) states that "the conditions governing *delivery of the traffic* under consideration at New York and Philadelphia are somewhat dissimilar" and states the facts as to terminal delivery at the two places separately. (R. 23d, 286 I.C.C., p. 122) (Italics supplied) In reaching its conclusion the Commission gave predominant consideration to the situation at New York, merely noting as to Philadelphia that "it is desirable that the charges for unloading at New York and Philadelphia be the same. The charges herein approved are for application at both points." (R. 23bb, 286 I.C.C., p. 141) In our statement we shall likewise state the facts as to terminal delivery separately for New York and Philadelphia and shall deal primarily with the situation at New York.

Delivery at New York. At New York the railroads do not provide team tracks, conventionally used for the delivery of carload freight, adequate for the delivery of the tremendous volume of fresh fruits and vegetables transported to that point. The annual rail movement to the New York area approximates 100,000 carloads. (R. 23h, 286 I.C.C., p. 125) "Approximately 75 percent of the fresh fruits and vegetables consigned to the New York market is delivered at the pier stations of the Pennsylvania, Erie, Baltimore & Ohio, and New York Central" located on the Hudson River on the lower west side of Manhattan Island. (R. 23e, 286 I.C.C., p. 122) "The remainder of the deliveries is made to chain-store warehouses or to team tracks and sidings in other parts of the city. *The railroads established their delivery terminals on the waterfront indicated during the latter part of the nineteenth century and have concentrated their fruit and vegetable deliveries in this area.*" (R. 23e, 286 I.C.C., p. 122) "These piers are adjacent to Washington Market, the largest fruit and vegetable market in New York and the primary market for the entire

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metropolitan area. The principal consuming population served by the New York wholesale market lies east of the Hudson River, where 80 percent of the volume of fruits and vegetables delivered to that market is distributed. The wholesale market is in the lower part of Manhattan Island. The considerations which led to that location have been justified by the growth of facilities in that area to receive, sell, and store perishable commodities." (R. 23e, 286 I.C.C., p. 123) (Italics supplied)

"Because of the geographical location of New York, freight consigned to that point must be moved thereto either by car floats or lighters across the Hudson River from the New Jersey side, except, as stated, traffic routed over the New York Central.* The rails of the other respondents serving that point, as regards freight traffic, terminate at points on the west bank of the Hudson River in the vicinity of Jersey City, N. J. Carloads of fruits and vegetables arriving at these rail terminals, consigned to New York, are moved onto car floats equipped with tracks, and transported by tugs across the Hudson River, either to certain piers equipped for the handling of such traffic, where the freight is unloaded by the carriers and placed on the pier platform for delivery to the consignee, or to certain locations equipped with float bridges over which the cars are moved from the car floats to rails extending therefrom to certain team tracks, private sidings, or warehouses, where delivery is completed and the freight ordi-

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*"Only one of the respondents, the New York Central, has an all-rail line into Manhattan for the delivery of freight. The line enters New York from the north and extends south over the west side of the city to a point not far from the wholesale market area. The line has limited capacity and could not handle expeditiously the volume of fruits and vegetables delivered to the New York market even if its facilities were opened to other carriers. In fact many of the cars of fresh fruits and vegetables delivered by that carrier for trading in the wholesale market are moved by car float to its pier station (piers 16 and 17) in the vicinity of Barclay Street." (R. 23f, 286 I.C.C., p. 124)

narily unloaded by the consignee." (R. 23f-23g, 286 I.C.C., p. 124)

The pier stations at New York "have no team track facilities on which cars can be placed" for unloading by the consignee. "Respondents do not accord the consignees the option of performing the unloading" at the piers. (R. 23f-23e, 286 I.C.C., p. 123) "After the vegetables are placed on the pier platform they are accessible to the consignee, and when he signs for them, he is permitted to take them away." (R. 23k, 286 I.C.C., p. 127) "There are no physical means by which consignees' trucks can reach the car floats." Consignees "are not permitted to take delivery of their freight from that facility. *The pier floor is the first place where, after the freight has been unloaded, delivery can be taken.* At the original hearing the railroads offered to permit consignees to unload their freight from the car float. After the prior decision in this proceeding, the California Fruit Growers Exchange requested the railroads to permit the consignees, as a whole, to perform the unloading at the piers. The request was denied." (R. 23g-23h, 286 I.C.C., p. 125) (Italics supplied.)

"In taking pier station delivery, the fruit and vegetable trade has the advantage of displaying the entire contents of the car, thus affording the buyer the benefit of a thorough examination of the freight; of using the pier facilities as a sales' mart; and of occupying auction-room facilities without special charge therefor." (R. 23h, 286 I.C.C., p. 125)

Charges for display, sorting, stacking, or other services after delivery, are not involved in this case. In its original report the Commission said (R. 24i, 272 I.C.C., p. 655):

> "Services not contemplated as part of those for which the unloading charges are proposed, include sorting of the packages according to brand, grade, and size. Although usually performed by representatives of the consignee, the entire load in the first instance may be stacked by railroad labor or by agents of the carriers

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and then resorted and restacked either by rail or consignee employees; or the rail employees, when previously advised by the consignee, may sort the packages as they are taken from the trucks. For this resorting and restacking service, when performed by the railroads or their designated agents, a charge is made pursuant to appropriate tariff authority. See *Allowances for Stacking,* 179 I.C.C. 780."

Delivery of the fruit and vegetable traffic at the pier stations in New York is the most efficient and economical method of delivery for the railroads. The Commission found:

> "The most economical plan of terminal handling of fruits and vegetables at New York is the unloading of the car from the car float, as at the present time, to the pier platform for delivery to the consignee." (R. 23n, 286 I.C.C., p. 130)

"The record indicates that the unloading is performed with a high degree of efficiency and with the utmost dispatch. In no other manner could these commodities be unloaded and delivered to consignees in the short space of time available. When the cars are unloaded they are immediately returned empty to the New Jersey side, and other car floats are placed at the piers for unloading. So expeditious is the unloading service that it permits of the use of the same platform space for unloading and stacking freight two and sometimes three times each night on which loading is performed." (R. 23g, 286 I.C.C., pp. 124-125) "*A witness on behalf of the Erie stated that pier-station delivery on Manhattan Island is the most efficient method which that carrier has been able to organize.* So efficient is the operation that the Erie has handled in one day, at piers 20 and 21, as many as 367 cars of fruits and vegetables. It never handles less than 50 cars a day. This method of delivery has been utilized by the Erie for more than 60 years." (R. 23i, 286 I.C.C., p. 126) (Italics supplied)

The railroads do not provide, and it is not now possible without the expenditure of approximately $24,000,000 for them to provide, team tracks (conventionally provided for the delivery of carload freight) for delivery of the enormous volume of fresh fruits and vegetables consigned for delivery on Manhattan. The existing team tracks on Manhattan "are heavily used for nonperishable freight." (R. 23f, 286 I.C.C., p. 124) In its "Notice" of October 10, 1950 issued after rehearing and specifying evidence to be furnished at a further hearing, the Commission had called upon the railroads to supply "evidence to show the difference in costs to them of handling fruits and vegetables, in carloads, at piers on Manhattan Island as compared with the handling of carloads of fruits and vegetables at railroad team-tracks on Manhattan Island and in Jersey City, N. J." (R. 293) The hearing examiner found that the "respondents have failed to respond in any substantial way to the terms of that notice." (R. 95) The Commission found: "The respondents have not shown what investment would be required for the construction in Manhattan of team tracks necessary to accommodate delivery of the fruit and vegetable traffic. * * * Respondents assume that as to both piers and team tracks the existing facilities are adequate to accommodate the entire volume of fruit and vegetable traffic destined for Manhattan delivery. *The record establishes, however, that only a relatively small part of the total volume of such traffic can be accommodated on the existing team tracks in Manhattan.*" (R. 23o, 286 I.C.C., p. 131) (Italics supplied.)

A study comparing the costs to the railroads of delivering the fruit and vegetable traffic at the pier stations on Manhattan with the costs of providing adequate team tracks and making deliveries thereon was presented by protestants. This evidence showed that for the two railroads handling all but a small part of the traffic at the Manhattan pier stations, the Pennsylvania and the Erie, the cost of construction of the required additional team-track facilities would be $12,212,000 and $11,884,000, respec-

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tively, a total of $24,096,000. (R. 23q, 286 I.C.C., p. 133) The Commission found:

> "On the record in this proceeding it is apparent that pier-station deliveries in Manhattan are accomplished by respondents handling the great bulk of the traffic at costs that are, in the aggregate, somewhat less than the protestants' estimated costs that would be incurred by respondents for expanded team-track deliveries, and that the 'difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities' disfavors the investments that would be required for team-track facilities sufficiently expanded to accommodate traffic now moving over the piers, even without giving consideration to the additional costs, incident to operation of such expanded facilities." (R. 23r, 286 I.C.C., p. 133)

The Commission also found that deliveries on team tracks would require "more car detention and more switching" than does pier delivery. (R. 23i, 286 I.C.C., p. 126) It found further that "The record shows that it would be impracticable, if not impossible, to expand rail facilities on Manhattan to the extent necessary to accord team-track delivery on the volume of fruits and vegetables consigned to New York. The high cost of land on Manhattan Island and the time required for handling cars across float bridges during periods of peak volume of traffic, would render team-track delivery impracticable." (R. 23n, 286 I.C.C., p. 130)

Pier Delivery of Other Traffic. At New York the railroads make delivery of all other kinds of carload freight at their pier stations at their line-haul rates without extra charge. The Commission found that the physical method of handling and delivery, including unloading of cars, is identical as to all traffic.

"Utilization of pier stations by the carriers serving Manhattan Island is not confined to those at which fresh fruits and vegetables are handled. At the present time, these carriers utilize approximately 35 city-owned piers for the handling of freight of all descriptions. As regards the

movement of freight, other than fruits and vegetables, by car float to the New York piers, and the unloading of such freight to the pier platform, the operation is identical with the manner in which fruits and vegetables are car-floated and unloaded." (R. 23e-23f, 286 I.C.C., p. 123)

"The piers at which the assailed unloading charges on fruits and vegetables apply are open generally for the receipt and delivery of carload freight in packages. All such freight is unloaded from and loaded into cars on car floats. Freight of all kinds may be shipped from and to these piers, except that the Pennsylvania produce terminal (piers 27 and 28) is limited to the receipt and delivery of perishable freight. But even these piers, in addition to the handling of fruits and vegetables, are open to the handling of butter, butter substitutes, cheese, eggs, dressed poultry, fresh meats, fish, oysters, flower bulbs, and raw silk. All freight, other than fruits and vegetables, is unloaded by the rail carriers at their pier stations without charge therefor in addition to the line-haul rates." (R. 23h, 286 I.C.C., p. 125)

"Consideration is, however, being given by respondents to the establishment of unloading charges on traffic other than fresh fruits and vegetables, but as yet no definite conclusion in respect of such action has been reached." (R. 23c, I.C.C., p. 121)

Delivery at Philadelphia. Prior to 1927 deliveries of fruits and vegetables at Philadelphia were made at piers on the Delaware River. "At the piers unloading, similar to the present operations at New York piers, was performed by the carriers without charge therefor other than the line-haul rate. In fact, delivery could not be accomplished without first unloading the freight. In 1927, the Pennsylvania and the Baltimore & Ohio constructed separate and competitive produce terminals, either of which was then capable of accommodating the needs of the fruit trade at that point, and at both of which unloading under the line-haul rate, as previously performed at the piers, was continued." (R. 23r, 286 I.C.C., pp. 133-134)

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"Since 1927 and prior to November 1, 1948, approximately 95 percent of the fruits and vegetables consigned to Philadelphia, other than for chain stores, has been handled at the Pennsylvania produce terminal." This terminal consists of two platforms, designated "A" and "B", where the carrier unloads the cars and makes delivery of the freight to the consignee on the platforms. In addition to the tracks serving the platforms, the Pennsylvania has team tracks at this terminal on which cars of fruits and vegetables are delivered. "The consignees perform the unloading when the cars are spotted on the team tracks, or at other stations of the Pennsylvania." (R. 23r-23s, 286 I.C.C., p. 134)

"Since November 1, 1948, when the charges assailed became effective, the carloading operation at Philadelphia has not changed, except that the Pennsylvania now charges for that service and also refuses the consignees the privilege of unloading their own freight on the platforms if they elect to do so. At present, cars will not be placed for unloading at the platforms unless unloading by the carrier is ordered by the consignee." (R. 23s, 286 I.C.C., p. 134)

Delivery of the freight at the platforms is not accomplished until after the freight has been unloaded from the cars by the carrier and placed on the platform and made available to the receiver. (R. 23s, 286 I.C.C., pp. 134, 135) This method of unloading and delivery "had been performed by the carriers prior to November 1, 1948, without charge therefor other than the line-haul rate. Since the unloading charges became effective, 63 percent of the commodities originally unloaded, sorted, sold, and delivered on the terminal platform is now unloaded on team tracks by consignees." (R. 23t, 286 I.C.C., p. 135)

After the unloading charges became effective the Philadelphia consignees requested the Pennsylvania Railroad to allow them to unload their freight at the produce terminal platforms, but this request was refused. (R. 23v, 286 I.C.C., p. 137)

The Commission recites different costs of unloading and delivery of the traffic at Philadelphia presented by the carriers and by a protestant (R. 23o-23p, 286 I.C.C., pp. 131, 138), but makes no finding except that "Unloading operations are less expensive at Philadelphia than at New York." (R. 23d, 286 I.C.C., p. 122)

The Commission found the team-track facilities of the railroads at Philadelphia adequate to accommodate the fresh fruit and vegetable traffic. (R. 23y, 286 I.C.C., p. 139)

SPECIFICATION OF ERRORS

The District Court erred:

1. In failing to hold that the Commission disregarded the obligation of the railroads under their line-haul rates to make delivery and erroneously authorized at New York, N. Y., and Philadelphia, Pa., an extra charge in addition to the line-haul rates for delivery of fruits and vegetables without having determined or found that the line-haul rates (a) do not include delivery or (b) are inadequate to compensate the railroads for performing their customary obligation.

2. In failing to hold that where railroads have voluntarily established and for over 50 years have maintained pier stations for the delivery of fruit and vegetable traffic under their line-haul rates to New York, N. Y., delivery at such stations necessarily involving unloading of the cars by the railroads, the Commission is duty-bound by Section 15(7) of the Interstate Commerce Act to require railroads proposing an additional charge for delivery service at the piers to sustain "the burden of proof" of showing that their line-haul rates (a) do not include delivery or (b) are inadequate to cover such service; and no such showing or findings having been made here the Commission was duty-bound to find the additional charge unjustified and to order it canceled.

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3. In failing to hold that the Commission acted arbitrarily and contrary to the Interstate Commerce Act in authorizing a charge in addition to the line-haul rates for the delivery of fruit and vegetable traffic at the railroad pier stations when the railroads make delivery of all other kinds of carload freight at these stations at their line-haul rates without extra charge, the Commission having found that the physical method of handling and delivery, including unloading of cars, is identical as to all traffic.

4. In failing to hold that the Commission acted arbitrarily and contrary to the Interstate Commerce Act in authorizing unloading charges at New York, N. Y., and Philadelphia, Pa., on fruits and vegetables in addition to the line-haul rates when such charges are not assessed at any other point except where the consignee elects to request carrier unloading as a special additional service beyond delivery.

5. In concluding that the Commission found "that unloading is an additional service, wholly distinct from delivery," and that the Commission found that unloading by the carrier "is a desirable and justifiable accessorial service."

6. In concluding that the Commission found "this method of unloading saves the payment of switching charges by the consignee."

7. In dismissing the complaint and in failing to enjoin, set aside and annul that portion of the order of the Commission dated May 7, 1952 authorizing and approving the establishment and maintenance by the railroads at New York, N. Y., and Philadelphia, Pa., of unloading charges on shipments of fruits and vegetables, in carloads, in addition to their line-haul rates (issued in I. & S. Docket 5500), and the order of the Commission dated December 15, 1952, ratifying and reaffirming such authorization and approval and dismissing without hearing the complaints in Dockets Nos. 31105 and 31106.

ARGUMENT

SUMMARY OF ARGUMENT

Under American custom and practice it has long been established as a matter of law that the line-haul rates of the railroads include delivery of the freight to the consignee. This was succinctly stated by this Court in *United States* v. *American S. & T. Plate Co.*, 301 U. S. 402, 409, as follows:

> "It is conceded that the line-haul rate covers delivery. Such rates are usually made to or from an area, sometimes designated a 'switching district' or 'switching limits.' Within that area the carrier holds itself out as agreeing to deliver freight in its freight depot or at team tracks or on sidings or spur tracks owned by an industry."

This fundamental rule of law was stated in historical terms by the Commission in *Associated Jobbers of Los Angeles* v. *A., T. & S. F. Ry. Co.*, 18 I.C.C. 310, 314, in the following language:

> "The American railroad rate has always been recognized as covering the full service which the carrier gives—in furnishing the car, a proper place at which to load it, the conveyance of that loaded car, and its terminal delivery."

In the present case the Commission authorized and approved for the first time the establishment by the railroads of a separate charge for delivery, in addition to their line-haul rates, on carload shipments of fresh fruits and vegetables from origins throughout the United States to New York, N. Y., and Philadelphia, Pa., without having determined or found that the line-haul rates (a) do not include delivery or (b) are inadequate to compensate the railroads for performing their customary obligation. The additional charge is termed an "unloading" charge but the Commission's findings make inescabably clear that the charge in-

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volved is *a charge for delivery.* In its final report the Commission states (R. 23e, 286 I.C.C., p. 123):

> "Respondents [the railroads] do not accord the consignee the option of performing the unloading. Under their proposal the line-haul rate will apply only to the New York piers, *with an additional charge for unloading the freight and placing it on the pier platform where the consignee can accept delivery.*" (Italics supplied)

The report also states (R. 23m, 286 I.C.C., p. 129):

> "Respondents' proposal would, however, tend to split the New York metropolitan area by making delivery without extra charge therefor at team tracks on the New Jersey side of the Hudson River while assessing a charge, in addition to the line-haul rate, *for making delivery* at New York piers." (Italics supplied)

For over 50 years the railroads "have concentrated their fruit and vegetable deliveries" at pier stations voluntarily established and maintained by them on the lower west side of Manhattan Island. (R. 23e, 286 I.C.C., p. 122) Of these pier deliveries 90 percent are made by the Erie Railroad and the Pennsylvania Railroad. (R. 23q-23r, 286 I.C.C., p. 133) At these pier stations the railroads refuse to allow the consignees to unload the cars, although requested to do so, and insist on performing the unloading themselves. *"The pier floor is the first place where, after the freight has been unloaded, delivery can be taken."* (R. 23g, 286 I.C.C., p. 125) "After the vegetables are placed on the pier platform they are accessible to the consignee, and when he signs for them, he is permitted to take them away." (R. 23k, 286 I.C.C., p. 127) (Italics supplied)

The present method of unloading the cars of fruits and vegetables and making delivery on the piers "has been in effect for many years without substantial change." (R. 24f, 272 I.C.C., p. 652) *"This method of delivery* has been utilized by the Erie for more than 60 years." (R. 23i, 286 I.C.C., p. 126) (Italics supplied)

During this half-century the unloading and delivery service was performed at the line-haul rates. No charge in addition to the line-haul rates was made for this service until November 1, 1948, after the Commission's approval of the additional charge in its first report in the proceeding under review. (R. 23b, 286 I.C.C., pp. 120, 121)

The use of their pier stations for the delivery of the fruit and vegetable traffic at New York is the most economical method of delivery for the railroads. The Commission found (R. 23n, 286 I.C.C., p. 130):

> "The most economical plan of terminal handling of fruits and vegetables at New York is the unloading of the car from the car float, as at the present time, to the pier platform for delivery to the consignee."

The Commission's report further states:

> "A witness on behalf of the Erie stated that pier-station delivery on Manhattan Island is the most efficient method which that carrier has been able to organize. So efficient is the operation that the Erie has handled in 1 day, at piers 20 and 21, as many as 367 cars of fruits and vegetables." (R 23i, 286 I.C.C., p. 126)

> "In no other manner could these commodities be unloaded and delivered to consignees in the short space of time available." (R. 23g, 286 I.C.C., p. 124)

The railroads do not provide, and it is not now possible without the expenditure of approximately $24,000,000 for them to provide, team tracks (conventionally used for the delivery of carload freight) for delivery of the enormous volume of fresh fruits and vegetables consigned for delivery on Manhattan. The existing team tracks on Manhattan are "heavily used for non-perishable freight." (R. 23f, 286 I.C.C., p. 124). The Commission found (R. 23o, 286 I.C.C., p. 131):

> "The record establishes, however, that only a relatively small part of the total volume of such [fruit and

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vegetable] traffic can be accommodated on the existing team tracks in Manhattan."

For the two railroads handling 90 percent of the traffic delivered at the piers, the Erie and the Pennsylvania, the cost of providing team-track facilities for the fruit and vegetable traffic would be $24,096,000. (R. 23q, 286 I.C.C., p. 133). The Commission states that *such team tracks would not be as desirable for handling the traffic as the present method* (R. 23n, 286 I.C.C., p. 130):

> "The high cost of land on Manhattan Island and the time required for handling cars across float bridges during periods of peak volume of traffic, would render team-track delivery impracticable."

The Commission also found that even disregarding the added expense of operations in connection with such team-track facilities, the costs to the railroads of making delivery at their pier stations, including unloading of the cars, is less than would be the costs of delivering the traffic on expanded team tracks (R. 23r, 286 I.C.C., p. 133):

> "On the record in this proceeding it is apparent that pier-station deliveries in Manhattan are accomplished by respondent handling the great bulk of the traffic at costs that are, in the aggregate, somewhat less than the protestants' estimated costs that would be incurred by respondents for expanded team-track deliveries, and that the 'difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities' disfavors the investments that would be required for team-track facilities sufficiently expanded to accommodate traffic now moving over the piers, even without giving consideration to the additional costs, incident to the operation of such expanded facilities."

Section 15(7) of the Interstate Commerce Act places upon railroads "the burden of proof" of showing that a change in rates, charges, or practices "is just and reason-

able." The charge here proposed being for a delivery service heretofore and customarily compensated for in the line-haul rate, could not be justified except upon a showing that the line-haul rates are inadequate to compensate the carriers for performing their customary obligation. No such finding or determination was made by the Commission and on the record before it could not have been made. The railroads presented no such evidence and, in fact, took the position that the line-haul rates are irrelevant. Following rehearing and further hearing the examiner states in his report (R. 100):

> "In the instant proceeding, respondents not only failed to prove that the through charges are reasonable, but have taken the position that the reasonableness of the line-haul rates is irrelevant."

The Commission, having found and determined that the charges in issue are *for delivery*, a service covered by the line-haul rates, and being unable to find (because of absence of evidence from the railroads) that the line-haul rates are inadequate to compensate the carriers for performing their customary service, was required by Section 15(7) of the Act to hold that the railroads had not borne the statutory "burden of proof" of justifying the charges and to order the charges canceled. In authorizing and approving such charges the Commission acted invalidly and the portions of its orders of May 7, 1952 and December 15, 1952 authorizing and approving the charges should be enjoined, set aside and annulled.

The two Commission Reports.

In its original report, with four Commissioners dissenting and one not participating, the Commission had approved the establishment of the proposed separate unloading charge in addition to the line-haul rates in the full amount of the expense claimed by the railroads for performing the unloading service. This conclusion had been

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reached by the majority on the basis that the charge should be considered *independent of the line-haul rates.* The original report states:

> "The establishment of specific charges for unloading at New York and Philadelphia, without reference to the levels of the line-haul rates is justified. Such charges are in substantially the same category as those for switching, transit, refrigeration, and various other special services for which separate charges are published." (R. 24q-24r, 272 I.C.C., p. 662)

> "Admittedly, respondents have deprived substantial benefits from the concentration of traffic at their New York and Philadelphia produce terminals and from the line-haul revenue received by them from this traffic, but these factors are in no sense controlling in the determination of the issues now before us." (R. 24r, 272 I.C.C., pp. 662-663)

In its final report the Commission set aside the original conclusions and condemned as "not shown to be just and reasonable" the charges originally approved. Such charges, which had become effective following the original report, were required to be canceled. The Commission abandoned and reversed the conclusion in the first report that the charge for unloading was to be considered accessorial to line-haul transportation and in the same category as other "special services for which separate charges are published." The findings in the final report, reached upon an "amplified record" and following rehearing and further hearing, are that the charge is *for making delivery.* These findings are quoted above.* De-

* Even in the original report the Commission had found: "A reasonable and proper conclusion as to when the unloading ceases and other operations begin, is that the unloading has been concluded when the produce is ready and available for actual delivery to the consignee. The shippers are not permitted access to the cars, and their trucks can come onto the pier floor only at specified times. Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor." (R. 24h-24i, 272 I.C.C., pp. 654-655)

spite these findings, the Commission authorized and approved the establishment of somewhat lower charges to be assessed in addition to the line-haul rates without having determined or found that the line-haul rates (a) do not include delivery or (b) are inadequate to compensate the railroads for performing their customary obligation of making delivery.

The reasons and grounds for the Commission's final decision are plainly and fully stated under the heading "General discussion and conclusions" in the final report. (R. 23y-23cc, 286 I.C.C., pp. 139-142). Although the hearing examiners following the rehearing and further hearing had bottomed their reports upon the legal obligation of the railroads to make delivery under their line-haul rates and had recommended condemnation of any additional charge because of the absence of proof by the railroads concerning their line-haul rates, the Commission in its discussion disregards and ignores the obligation of the railroads to make delivery under their line-haul rates.* Avoiding any recognition of the legal duty of the railroads under their line-haul rates to make delivery, the Commission states that due to the "topography" of the New York area "the present method of handling shipments through pier stations is of benefit to both shippers (including consignees) and carriers." Upon this basis the Commission concluded "that the cost of unloading should be borne partly by the shippers and partly by respondents." (R. 23z, 286 I.C.C., pp. 139-140)

The use of transportation and terminal facilities is always of benefit to both shippers and carriers. The shipper gets his goods transported to the place desired and the carrier benefits from the patronage of its facilities. The question here is not whether the shippers benefit from the use of the pier stations for the delivery of their freight but

* The two reports of the hearing examiners are included in the record at pages 51 *et seq.* and 81 *et seq.* Their discussion as to the obligation of the railroads to make delivery under their line-haul rates appears at R. 68-71, 112-113.

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whether they have paid, and are paying, for such use and for such delivery in the line-haul rates. If the line-haul rates fully compensate the railroads for such use and for such delivery, the railroads are not entitled to an extra and duplicate charge however beneficial pier station delivery may be to the shipper.

The Commission observes that it is not considered feasible for the railroads to provide at New York team-track terminal facilities adequate to handle the traffic. (R. 23z, 286 I.C.C., pp. 139, 140) This is, of course, no justification for not performing delivery under the line-haul rates to New York, N. Y. It was held by this Court in *Interstate Com. Com.* v. *Atchison, T. & S. F. Ry. Co.*, 234 U. S. 294, that where team-track delivery is not provided under the line-haul rates shippers are entitled to an equivalent substitute delivery service without additional charge. This Court there said (p. 314):

> "We cannot regard the act to regulate commerce as justifying an increased or extra charge for a substantially similar service . . ."

The Commission excuses the failure of the railroads to provide team tracks, but fails to apply the legal principle that the railroads are obligated under their line-haul rates to make delivery, either at team tracks or to provide an equivalent substitute delivery service. The mere general statement by the Commission that the railroads are under no obligation "to provide an excessive amount of terminal service", cannot and does not excuse the failure of the railroads to make delivery, even though team tracks be not provided therefor. There is no finding by the Commission that the method of delivery at the pier stations, including unloading, constitutes "an excessive amount of terminal service;" nor indeed could there be such a conclusion in the light of the Commission's positive findings that the service at the piers is for the purpose of "making delivery" and therefore merely a substitute for team-track delivery.

This is particularly true when considered in the light of the Commission's other findings that the pier station delivery, including unloading, is more economical for the railroads than the team-track delivery would be and avoids heavy capital investments in team-track facilities.

The Commission states that in view of its conclusion on the grounds just discussed the line-haul rates may be given only slight attention and "the propriety of the separate unloading charges may be determined without an extensive showing with respect to the reasonableness of the line-haul rates. The showing that the level of the rates to New York and Philadelphia is no higher than the rates to other consuming points where shippers unload or charges are assessed for unloading is of major importance in this respect." (R. 23aa, 286 I.C.C., p. 140) The failure of the Commission to give effect to the obligation of the railroads to make delivery under their line-haul rates is conclusively demonstrated by this minimizing of the line-haul rates. The reference to other communities where shippers unload or charges are assessed for unloading, completely disregards the fact that unloading charges are assessed elsewhere only when an unloading service is requested by the shipper as a service *additional to delivery.* At these other communities the railroads provide terminal delivery facilities at which consignees are given an opportunity to unload their freight.* At these other communities delivery is made under the line-haul rates. An additional charge for unloading at these other communities is assessed only where the consignee chooses to request the railroads to perform that service in addition to making delivery.

Upon analysis it is seen that the Commission refused to apply the law to the facts found by them and stated in their

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* "The Pennsylvania publishes specific charges for unloading carloads of fresh fruits and vegetables at Baltimore, Pittsburgh and Chicago. The consignees are, however, permitted to perform such unloading at these points." (R. 23w, 286 I.C.C., p. 137) See also dissenting opinion of Commissioner Knudson. (R. 23ff, 286 I.C.C., p. 145)

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final report. This view was expressed by Commissioner Knudson in his dissent, as follows (R. 23cc-23dd, 286 I.C.C., pp. 142-143):

> "In my opinion, the report of the majority is not based upon the provisions of the Interstate Commerce Act, which it is the duty of this Commission to administer and enforce. The facts in this proceeding are clear. They were fully stated in the reports of the examiners and have been reproduced almost verbatim in the majority report. Instead, however, of applying the law to those facts the majority, in my opinion, has resorted to expediency and compromise."

In reaching its conclusion the Commission gave predominant consideration to the situation at New York, merely noting as to Philadelphia that "it is desirable that the charges for unloading at New York and Philadelphia be the same. The charges herein approved are for application at both points." (R. 23bb, 286 I.C.C., p. 141)

The Commission Erred in Disregarding the Obligation of the Railroads to Make Delivery Under Their Line-Haul Rates.

It is fundamental in the transportation law of the United States that a railroad must make delivery under its line-haul rates. The only possible justification for Commission approval of an extra charge for delivery in addition to the line-haul rates would be a determination by the Commission that the line-haul rates in question (a) do not include delivery (a remote possibility but conceivable on basis of special facts and custom in a particular situation) or that the line-haul rates in question (b) are inadequate to compensate the railroads for performing their customary obligation. In the latter case it would be necessary for the Commission not only to determine that the line-haul rates are inadequate but that they are inadequate at least in the amount of the additional charge proposed to be assessed.

In the absence of such a showing the railroads may not legally impose a charge in addition to the line-haul rates

for delivery. "It is conceded that the line-haul rate covers delivery." *United States* v. *American S. & T. Plate Co.*, 301 U.S. 402, 409. Section 6(1) of the Interstate Commerce Act provides that carriers subject to the Act shall publish their rates in tariff schedules and shall state "separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require." This provision as to separate terminal charges has reference to terminal charges accessorial in character beyond the service covered by the line-haul rate. Terminal delivery has always been included within the service which the carrier is obligated to perform under its line-haul rate. "The American railroad rate has always been recognized as covering the full service which the carrier gives—in furnishing the car, a proper place at which to load it, the conveyance of that loaded car, and its terminal delivery." *Associated Jobbers of Los Angeles* v. *A., T. & S. F. Ry. Co.*, 18 I.C.C. 310, 314 (1910). In this early and leading case, known as the *Los Angeles Switching case*, the Commission dealt specifically with the language of Section 6 and the obligation of the railroads under their line-haul rates and said (p. 315):

> "The rate, which it is required shall be published, is a complete rate, which includes not only a charge for hauling, but the charge for the use of the terminals at both ends of the line.
>
> "The provisions of the act to regulate commerce were enacted with respect to the American method of stating rates, and when it is provided in section 6 that the schedules, which shall be published and filed with the Commission, 'shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed,' it was not intended that the carriers should be required to separately state what are known in the English law as station terminals—that is to say, that they shall state separately the hauling charge between the stations and the charge for the use of the terminal at both ends of

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> the line. The terminal charges referred to in section 6, and which *must* be expressly set forth in the carrier's tariff, are those for other services at the terminal which the carrier may furnish, such as storage, elevation, switching, and cartage. This construction of the act is borne out fully by its history and has been formally accepted by railroad counsel in advising the carriers. The railroads recognize their duty to make delivery under the flat rate stated in their tariffs, and such delivery is made upon industry tracks, which are part of the carrier's terminals, without additional charge."

In many cases through the years the Commission has enforced the obligation of the railroads to make delivery under their line-haul rates, the *Associated Jobbers case*, sustained by this Court in *Interstate Com. Com.* v. *Atchison, T. & S. F. Ry. Co.*, 234 U.S. 294, being a leading case bearing a close analogy to the present case. In that early proceeding the railroads serving Los Angeles had proposed a separate charge to be added to their line-haul rates when cars were delivered to the consignee on a private siding or spur. The line-haul rates to Los Angeles covered delivery to that city when made on the public team tracks of the railroads. The railroads contended that deliveries of the cars on the private siding were of great convenience to the receivers and that an extra charge was warranted. The Commission found that such private sidings were also of great convenience and benefit to the railroads in saving capital investments in terminal facilities and in permitting economical operation. The delivery on private siding was found to be *a mere substitute for delivery by the railroads at their own team tracks.* In the present case the railroad pier stations in Manhattan are likewise a mere substitute for conventional team-track delivery and allow the railroads to avoid heavy capital expenditures in team-track facilities and allow more economical operations than would be possible if carrier team tracks were provided at which the consignees could unload their own freight. In the *Asso-*

ciated Jobbers case, in disapproving the extra charge for delivery on private sidings, the Commission said (pp. 317, 318):

> "The service here under consideration, however, is a delivery service and nothing more; the delivery being made at one of the carrier's tracks which is removed at a greater or less distance from its public yards. Spur-track delivery is a substitute service, a service which costs the industry for the installation of the track and the use of its property as a railway terminal. It is a service over the carrier's own rails to a point where it yields possession of the property transported and which involves no greater expense than would team-track delivery. It relieves the carrier's team tracks and sheds, necessitating less outlay for expense of yards in a crowded city, promotes the speedy release of equipment, and vastly aids in conducting a commerce which is greater than the carrier's own facilities could freely, adequately, and economically handle.
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> * * * * * * * * *
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> "After a most exhaustive inquiry we cannot find, taking this service as a whole in the same way that it is treated by the carriers, that the service is more expensive to the carrier than if all cars were given team-track delivery.
>
> "An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate pays. If the shipper pays for team-track delivery and does not receive it, but asks instead and is given a side-track delivery which costs the carrier no more, he may not be compelled to pay an additional charge upon the assumption that he has received a terminal team-track service which has not been given. A carrier may not so construct its rates as to compel an extra charge for like service, and this, in our judgment, the defendants at Los Angeles have done."

This language might well be applied to the situation here involved at New York. Admittedly the line-haul rate "pays

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for team-track delivery" and the receiver at New York "does not receive it", and the railroads are unable to make team-track delivery in New York, N. Y. They have, instead of providing team tracks, established and maintained for over half a century their pier stations which the Commission's report and findings show to be more convenient and less expensive for them to operate than team tracks would be.

The Commission's decision and order in the *Associated Jobbers case* was upheld in *Interstate Com. Com.* v. *Atchison, T. & S. F. Ry. Co.*, 234 U.S. 294 (1914), the decision resting on the findings that the private sidings in Los Angeles "constituted part of the carrier's terminals, and that under the conditions there existing, the receipt and delivery of goods on these spurs was a like service as compared with the receipt and delivery of goods at team tracks and freight sheds . . ." (234 U.S., p. 311) The Court ruled (p. 314):

> "We cannot regard the act to regulate commerce as justifying an increased or extra charge for a substantially similar service . . . "

The obligation of the railroads to make delivery under their line-haul rates has been repeatedly enforced by the Commission in considering proposed separate terminal charges at New York. In *Unloading Lumber at New York Harbor*, 256 I.C.C. 463, 468 (1943), the Commission said:

> "The unloading here considered is required in order to make delivery at respondent's lighterage stations in New York Harbor . . . The nature and incidents of the unloading service here considered establish beyond a doubt that it is inextricably bound up with the line-haul service. It follows that respondents may not now segregate a component of that service, making a separate charge therefor, without an adequate showing that the aggregate charge for the through service is reasonable. Compare *Lighterage and Storage Regulations at New York*, 35 I.C.C. 47, 61. As such a showing was

> not made respondents have not met the requirements of the statute in that respect and accordingly have not sustained their burden as to the reasonableness of the proposed charge."

The same rule was applied by the Commission in *Fruits and Vegetables to Duane St., N. Y.*, 66 I.C.C. 135 (1922), involving *the same pier stations* and the *same traffic* as are here involved. The railroad had there proposed a separate terminal charge to cover terminal services, including unloading, to be added to the line-haul rates. The Commission found the proposed charges not justified, saying (p. 139):

> "The services for which the proposed terminal charges are published are all incidental to the efficient delivery of fruits and vegetables at Duane Street. They are performed on all that traffic and in no sense are special services comparable with refrigeration, reconsignment, or switching. *Respondent makes no showing as to the adequacy of the compensation now received by the carriers for the through service on this traffic.*" (Italics supplied)

In former cases where the railroads have sought to establish a separate charge for any terminal service previously included in the line-haul rate the Commission has required a showing that the compensation under the line-haul rate is inadequate or that the resulting total charges are reasonable for the total service performed. In *Lighterage and Storage Regulations at New York*, 35 I.C.C. 47 (1915), the Commission said (p. 61):

> "The assessment of any charge for terminal handling, the service having heretofore been performed under the freight rate, would have the effect of increasing that rate; and a proper justification of such an increase would involve consideration both of the line-haul and the terminal service to be performed under the increased rate. There is no evidence to warrant any finding upon the adequacy of the compensation now received by the carriers for their complete service.
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"The Commission strongly favors the analysis of service and rates as an aid to their measurement and comparison. But it holds that, where a terminal service has heretofore been treated by the carriers as a part of the transportation service covered by the freight rate, and regularly performed by them, they may not now segregate that service and assign to it a separate charge without taking into consideration, in order to justify such charge, the entire through service of which it forms a part and the compensation heretofore received for such through service."

The same ruling was made in *Terminal Charges at Pacific Coast Ports*, 255 I.C.C. 673 (1943), where a separate charge for terminal services, including unloading, was found not shown to be just and reasonable:

"We have frequently approved the separation of certain charges for accessorial services from the line-haul rates. *But this has only been upon a clear show that the resulting separate charges for each portion of the total services were just and reasonable.* In a number of these instances, the inclusion of certain services in the line-haul rates was for the benefit of particular shippers, and the extra cost entailed was not considered when the level of the line-haul rates was determined. *Here, however, the entire body of these export and import rates has been established and maintained and adjusted over a long period of time in contemplation of the performance by respondents of these terminal services as a part of the through transportation to and from the docks.* Their proposal to establish an additional charge for a portion of the through services is not reasonable unless there is a clear showing that the existing rates are reasonable for the line-haul services alone, or that the increased total charges are reasonable for the aggregate services." (Italics supplied)

In the present case the Commission disregarded the obligation of the railroads to make delivery under their line-haul rates and refused to give effect to that legal obliga-

tion. Although the Commission specifically found that the service in question is a delivery service, no determination or finding was made that the line-haul rates involved do not include such delivery. On the record and in the light of the Commission's other findings such a conclusion was impossible. Likewise, there was no determination or finding by the Commission that the line-haul rates are inadequate to compensate the railroads fully for the transportation, including performance of the delivery service involved. In its original report herein the Commission stated (R. 24, 272 I.C.C., p. 662):

> "Various rate statements and other evidence concerning the history of the respective rate adjustments indicate that the terminal services, including unloading, could not have been ignored in determining the line-haul rates."

The unloading and delivery service having been performed on the fruit and vegetable traffic under the line-haul rates for half a century, these services had become established as an integral part of the services covered by the line-haul rates. This Court has recognized that long-established custom and practice at a particular terminal may establish particular services, different than elsewhere, as covered by the line-haul rate. This was pointed out in *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193 (1935) involving the delivery of livestock at Chicago. It was at that time the general practice throughout the country for receivers of livestock to unload cars of livestock. This is the case at present on general carload freight throughout the country where cars are delivered to receivers prior to unloading on public team tracks or private sidings. But at Chicago, in connection with livestock, as at New York and Philadelphia in connection with the fresh fruit and vegetable traffic, the railroads had performed the unloading service because of special terminal conditions. After referring to the general practice throughout the country, this Court said (p. 199):

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"But the practice has long been otherwise at the Chicago Union Stock Yards. For more than 50 years prior to 1917 the carriers without any additional charge to shippers or consignees unloaded livestock into pens provided by the Yards Company."

Based on this fact the Court ruled (p. 200):

"Long continued practice and special conditions made unloading at these Yards a transportation service to be performed by the carriers."

With the unloading and delivery service here involved so plainly covered by the line-haul rates, both because of the general obligation of the railroads to make delivery under their line-haul rates and also because of the long-established custom and practice at the terminals here involved, the Commission obviously erred in approving an additional charge in the absence of a determination and finding that the line-haul rates provide inadequate compensation for the service performed. No such determination or finding was made or could have been made by the Commission on the present record because of the failure of the railroads to submit evidence concerning the adequacy of their line-haul rates. In both logic and law, evidence showing the inadequacy of the line-haul rates to compensate the railroads for the service performed was essential to the valid approval of the extra charges. Likewise, findings by the Commission that such a showing had been made were essential to the validity of the Commission's orders under review. In the absence of both findings and evidence the Commission's orders were unlawfully made and are invalid.

The Railroads Did Not Attempt to Show the Line-Haul Rates To Be Inadequate to Cover Delivery, and In Fact Contended That the Line-Haul Rates Are Irrelevant.

The absence of any finding in the Commission decision concerning the inadequacy of the line-haul rates to cover delivery merely reflects the fact that the railroads made no

attempt to make such a showing and presented no evidence for this purpose. It was the position of the railroads throughout the proceedings before the Commission that the line-haul rates were irrelevant. Following rehearing and further hearing the examiner states in his report (R. 100):

> "In the instant proceeding, respondents not only failed to prove that the through charges are reasonable, but have taken the position that the reasonableness of the line-haul rates is irrelevant."

The railroads steadfastly maintained (1) that the line-haul rates were not in issue, (2) that the unloading charge should be judged without regard to the line-haul rates, and (3) "that the obligation to effect a delivery is irrelevant to the issues in this proceeding." The following is quoted from the exceptions filed by respondent railroads to the proposed report of the examiners following rehearing (R. 347):

> "Further, respondents submit that they have here shown that the legal and factual conclusions on which the proposed report relies in reaching its ultimate conclusion are erroneous and that it should have found that the level of the line-haul rates is not in issue here, that the reasonableness of the unloading charges is dependent on the facts and circumstances relating to those charges alone without regard to the line-haul rates, that the obligation to effect a delivery is irrelevant to the issues in this proceeding and that protestants' contentions are not supported either by the evidence in this case or by the previous decisions of the Commission."

Even when the shippers presented certain exhibits relating to the line-haul rates, counsel speaking for all of the railroads parties to the case, objected on the ground that the line-haul rates were not in issue and that information concerning them was immaterial. (R. 896, 965-966) The following is from the transcript of hearing before the Commission (R. 896):

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"Mr. Miller: Mr. Examiner, I object to pages 13 and 21 of the exhibit. First, on the ground that the references there, as I understand them, are in large part references to the reasonableness of the line-haul charges, which I think are wholly immaterial in this case. * * * With respect to pages 22 through 30, I understand that information is submitted on the issue of the line-haul charge, and I therefore object to that as immaterial.

"Exam. Brown: I don't understand the last objection.

"Mr. Miller: As I understand these pages of the exhibit, they go to the reasonableness of the line-haul charges, and that that is their only purpose in this proceeding. I think that issue is not in issue here.

"Exam. Brown: That is a rather argumentative question, whether line-haul rates, although concededly not in issue, it is possible that they might play a considerable part in the determination of the issue.

"Mr. Hoffman: Is counsel making that statement which he has just made in behalf of all carriers?

"Mr. Miller: Yes.

"Exam. Brown: All carriers other than those represented by counsel?

"Mr. Smith: No, sir. I subscribe to what Counsel Miller has stated for the record.

"Mr. Miller: You mean all carriers parties to this proceeding?

"Mr. Hoffman: Yes.

"Mr. Miller: Oh, yes. Definitely."

The hearing examiner made it clear that evidence concerning the line-haul rates "might play a considerable part in the determination of the issue," but the respondent railroads presented no evidence concerning the reasonableness of those rates or the inadequacy of those rates to cover performance of the unloading and delivery service. The record will, therefore, be searched in vain for any evidence

as to the amount included in the line-haul rates to cover the unloading and delivery service or the adequacy or inadequacy of the line-haul rates for the total service performed. Information as to the compensatory character of the line-haul rates is, of course, peculiarly within the knowledge of the railroads and is not a subject on which the shippers or receivers could be expected to have the best evidence.

Section 15(7) of the Interstate Commerce Act provides:

> "At any hearing involving a change in rate, fare, charge, or classification, or any rule, regulation, or practice, . . . the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable . . ."

It is appellants' position that the railroads could not in law justify the assessment of an extra charge in addition to their line-haul rates for the unloading and delivery service except by sustaining "the burden of proof" of showing that their line-haul rates are inadequate to compensate them for the performance of their customary obligation. The hearing examiners, following the rehearing and further hearing, recognized the legal obligation of the railroads to make delivery under their line-haul rates. (See reports of examiners, R. 66-69) Because of the failure of the railroads to make any showing as to the inadequacy of the line-haul rates, the examiners felt legally compelled to conclude that the burden of proof required by Section 15(7) had not be sustained. (R. 80) The report of the examiners following the first rehearing states:

> "It is not sufficient to consider the matter solely in the light of the unloading charges as such. Determination of whether the terminal carriers are receiving adequate revenues from the traffic as a whole is necessary. All of these respondents receive a line-haul on this traffic and derive substantial revenues therefrom. And if these revenues are not sufficient to compensate for the

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line-haul transportation and for services such as unloading, the matter should be brought to the Commission's attention in an appropriate manner."

"The burden of proof that the assailed charges are just and reasonable is upon respondents under the provisions of section 15(7) of the act. This burden has not been met. The Commission should find that the assailed unloading charges are unjust and unreasonable". (R. 80)

The report of the examiner following the second further hearing states:

"The compensation for the unloading of the fruits and vegetables performed by the respondents for more than 50 years was included in the line-haul rates. The addition of a charge for this unloading service performed before delivery requires clear and convincing proof that the practice of unloading without an added charge is unfair to the respondents because of the inadequacy of the line-haul rates for the total services rendered. Following like expressions in prior proceedings referred to herein, it would appear that it is not sufficient to consider only the cost of the unloading service. The impracticability of unloading by the consignees and the adequacy of the revenues from the traffic as a whole are necessary considerations. All of the respondents receive a line-haul on this traffic and derive substantial revenues therefrom. * * *

"The burden of proving that the addition to the line-haul rates of separate charges for the unloading services performed by the respondents is just and reasonable and not otherwise unlawful was and is upon the respondents, under the provisions of section 15(7) of the act. This burden has not been met." (R. 115)

The Court should understand that the railroads have readily available to them means for increasing their compensation without assessing a separate charge for unloading and delivery in addition to their line-haul rates. The Commission gives as the fundamental cause of the carriers' action in proposing the extra charge the fact that "in re-

cent years, the cost thereof [the unloading and delivery service] substantially increased." (R. 23z, 286 I.C.C., pp. 139-140)

The general increase in railroad expenses in recent years has been recognized by the Commission in authorizing very substantial increases in the line-haul rates of the railroads. In its final report herein (R. 23b) the Commission makes reference to a 30 percent increase effective October 6, 1947, which was authorized generally in all railroad rates and charges. *Increased Freight Rates, 1947*, 269 I.C.C. 33; 270 I.C.C. 81; 270 I.C.C. 93; 270 I.C.C. 403. Subsequently, a further increase of approximately 10 percent was authorized in *Increased Freight Rates, 1948*, 272 I.C.C. 695; 276 I.C.C. 9; 279 I.C.C. 303. A still further increase of 15 percent was authorized in *Increased Freight Rates, 1951*, 280 I.C.C. 179; 281 I.C.C. 557; 284 I.C.C. 589; 289 I.C.C. 395. These increases which have been authorized and made effective since 1947 constitute an aggregate increase of 64 percent. Some limitation was provided in these decisions as to the maximum increases which might be made in the line-haul rates on fresh fruits and vegetables but the aggregate increases in the line-haul rates on carload shipments of these commodities closely approach the maximum increases stated.

In addition to the increases in revenue which the railroads have received by these increases in their line-haul rates, the carriers making delivery of the fruit and vegetable traffic also have available possible adjustments and increases in their divisions of the line-haul rates. Section 15(6) of the Interstate Commerce Act grants to each carrier participating in joint rates the right to obtain an increase in its division of the through line-haul rates if the present divisions are inadequate fairly to compensate it for the services performed. Proceedings under this section for an increase in the division on the fruit and vegetable traffic were brought by the Erie Railroad and increased divisions were granted by the Commission in *Erie*

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RR. Co. v. *A. & V. Ry. Co.*, 98 I.C.C. 268. That case involved the transcontinental rates on fresh fruits and vegetables to New York, and included the Duane Street pier station of that railroad involved in the present case. The Commission granted an increase in the special terminal factor received by the Erie to cover its terminal services, including unloading.* In *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.*, 194 I.C.C. 729, the Commission fixed divisions of the line-haul rates applying to New York and Philadelphia on citrus fruits from Florida, including the divisions of the delivering railroads. In that decision the Commission specifically considered the fact that the delivering carriers unloaded the traffic at their New York and Philadelphia stations. (194 I.C.C., p. 746) If the delivering carriers are dissatisfied with their present divisions and feel that they are being inadequately compensated for the unloading and delivery service which they are performing under the line-haul rates, they may bring such proceedings under Section 15(6) at any time. Certainly a problem of inadequate divisions should not be permitted to result in duplicate charges to shippers and consignees who have already paid once for all the service they receive.

The Commission Acted Arbitrarily In Approving a Discriminatory Treatment of the Fruit and Vegetable Traffic.

We learn from the terminal cases, *e.g.*, *United States* v. *American Sheet & Tin Plate Co.*, 301 U.S. 402; *United States* v. *United Smelting, R. & M. Co.*, 339 U.S. 186, the following fundamentals concerning the terminal services to which shippers are entitled under the line-haul rates on carload traffic:

1. They are entitled to delivery. "It is conceded that the line-haul rate covers delivery." (301 U.S. 402, p. 409)

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* "At Duane Street the Erie unloads the contents of the car. * * *" (98 I.C.C., p. 272)

2. They are entitled to "uniform and equal" and "equivalent" delivery service to avoid "unlawful preferential service." (339 U.S. 186, pp. 189, 197)
3. Such "equal" service has been standardized as the equivalent of team-track delivery. (339 U.S. 186, p. 197)

In the present case the Commission disregarded all of these fundamentals. We have shown above the Commission's disregard both of the obligation of the railroads to make delivery under their line-haul rates and also of their obligation to provide team-track delivery or an equivalent delivery service. The present chapter is directed to the discrimination against the fruit and vegetable traffic and the preference of other traffic which the Commission has arbitrarily authorized and approved.

The denial to the fruit and vegetable traffic of delivery at the line-haul rates constitutes a fundamental discrimination when all other traffic is accorded this service at the line-haul rates. Likewise, the denial to the fruit and vegetable traffic of team-track delivery or of an equivalent delivery service when all other traffic receives this *quantum* of delivery service under the line-haul rates constitutes a fundamental discrimination.

The discrimination which the Commission has authorized is brightly spotlighted at the Manhattan pier stations. The charge for delivery in addition to the line-haul rates is not applied on any other traffic delivered at these stations. (R. 23e, 286 I.C.C., p. 121) Thirty-five railroad pier stations are maintained and operated on Manhattan for the handling of carload freight "of all descriptions." (R. 23f, 286 I.C.C., p. 123) The Commission found that the physical method of handling and delivery, including unloading, is identical as to all traffic:

> "As regards the movement of freight, other than the fruits and vegetables, by car float to the New York piers, and the unloading of such freight to the pier platform, the operation is identical with the manner

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in which fruits and vegetables are carfloated and unloaded." (R. 23f, 286 I.C.C., p. 123)

Even the particular pier stations utilized for the delivery of the fruit and vegetable traffic are "open generally for the receipt and delivery of carload freight in packages." The Commission found (R. 23h, 286 I.C.C., p. 125):

> "The piers at which the assailed unloading charges on fruits and vegetables apply are open generally for the receipt and delivery of carload freight in packages. All such freight is unloaded from and loaded into cars on car floats. Freight of all kinds may be shipped from and to these piers, except that the Pennsylvania produce terminal (piers 27 and 28) is limited to the receipt and delivery of perishable freight. But even these piers, in addition to the handling of fruits and vegetables, are open to the handling of butter, butter substitutes, cheese, eggs, dressed poultry, fresh meats, fish, oysters, flower bulbs, and raw silk. All freight, other than fruits and vegetables, is unloaded by the rail carriers at their pier stations without charge therefor in addition to the line-haul rates."

Thus the Commission has approved an unjustifiable discrimination against the fruit and vegetable traffic. The railroads did not attempt to distinguish between the fruit and vegetable traffic and traffic generally in a way to justify this discrimination and the Commission findings are that no distinguishing justification exists. This would appear to be plainly a discrimination forbidden both under Section 2 and Section 3(1) of the Interstate Commerce Act. The hearing examiner in his report following the second further hearing recommended that the Commission find the charges on fruits and vegetables not shown to be "just and reasonable" and "also in violation of Section 3(1) of the Act." He stated that a finding under Section 2 was not necessary. (R. 115)

Section 3(1) of the Act prescribes equality of treatment of commodities by making unlawful the unreasonable preference of "any particular description of traffic" or the

subjection of "any particular description of traffic" to any "unreasonable prejudice or disadvantage in any respect whatsoever." Clearly the railroads are subjecting the fruit and vegetable traffic to unreasonable prejudice and disadvantage in assessing a charge in addition to the line-haul rates for the unloading and delivery service when all other kinds of traffic handled at their 35 Manhattan pier stations, including the same pier stations that are used for the handling and delivery of fruits and vegetables, are accorded the identical service at the line-haul rates. See *United States* v. *Baltimore and Ohio R. Co.*, 333 U.S. 169.

Section 2 prohibits the charging or demanding of a greater compensation "for any service rendered" than is charged others for doing "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." Here the service has been found by the Commission to be "identical" and is performed at the same stations, but an extra charge is assessed against the fruit and vegetable traffic whereas no charge in addition to the line-haul rates is assessed on other perishables or on any other traffic.

It was stated in the Commission's original report, decided in 1948, that the railroads were giving "consideration" "to the establishment of unloading charges on traffic other than fruits and vegetables but that no definite conclusion has been reached." (R. 24b, 272 I.C.C., p. 649). This statement is repeated in the final report dated May 7, 1952. (R. 23c, 286 I.C.C., p. 121) We submit that such "consideration" is no defense to the prohibitions of the statute. The statute forbids the discrimination. The expressed willingness on the part of the railroads to give consideration to removing the discrimination does not annul or suspend the statutory requirement of equal treatment.

Another aspect of the discriminatory treatment of the fruit and vegetable traffic should be pointed out. This relates to the fact that the Commission authorized an additional charge at New York and Philadelphia for "unload-

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ing" although no such charge is assessed at any other community except when an unloading service is requested by the shipper as a service *additional to delivery.* At the pier stations in New York and the produce terminals in Philadelphia the consignees are denied an opportunity to unload cars of fruits and vegetables. The railroads insist upon performing the unloading themselves. The consignees at New York and Philadelphia are denied delivery at the piers and produce terminals until the railroads, by their own election and for their own benefit, have unloaded the cars.

At other communities the railroads make delivery under their line-haul rates on team tracks or at produce terminals without any unloading charge unless the consignee requests such service in addition to delivery. The Commission states:

> "The Pennsylvania publishes specific charges for unloading carloads of fresh fruits and vegetables at Baltimore, Pittsburgh and Chicago. The consignees are, however, permitted to perform such unloading at these points. The protestants at Philadelphia call attention to the fact that all shipments of fruits and vegetables consigned to those markets are unloaded by the consignees, except when they request the carrier to perform that service. When thus requested, the carrier performs the service and collects the charges therefor." (R. 23w, 286 I.C.C., 137)

This difference in the nature of the "unloading" charge at New York and Philadelphia compared with the charge for unloading elsewhere was emphasized by Commissioner Knudson in his dissenting opinion. (R. 23ff-23gg, 286 I.C.C., p. 145)

It is clear, therefore, that in imposing an additional charge for a compulsory "unloading" at New York and Philadelphia these communities are subjected to charges not assessed elsewhere. The Commission acted arbitrarily in authorizing such discriminatory treatment.

The Commission's Final Report Reversed and Abandoned the Grounds of Decision in the Original Report.

In its reports, the original dated October 4, 1948 (R. 24, 272 I.C.C. 648) and the final dated May 7, 1952 (R. 23, 286 I.C.C. 119), the Commission reached substantially different conclusions and advanced different reasons and grounds of decision. The original decision was concurred in by six Commissioners, with four Commissioners dissenting, and one not participating. (R. 24s, 272 I.C.C., p. 663) In this report the majority had approved as "just and reasonable" the "unloading" charge in addition to the line-haul rates in the full amount proposed by the railroads. The final decision was reached upon an "amplified" record after rehearing and further hearing with one Commissioner dissenting, one not participating, and with three Commissioners joining in a special concurrence that they fully agreed "with this report to the extent that it *reverses the prior report,*" from which they had dissented, and stating further that they "*go along*" with "the additional ultimate findings in this present report only because they afford some immediate relief to shippers in that unloading charges here approved are substantially lower than the proposed charges which have been applied on this traffic since November 1, 1948, pursuant to the findings in the prior report." (R. 24cc, 286 I.C.C., 142) (Italics supplied)

In the final report the Commission set aside the original conclusions and condemned as "not shown to be just and reasonable" the charges originally approved. Such charges, which had been made effective by the railroads following the original report, were required to be canceled.

The reasons and grounds for the Commission's final decision, authorizing substantially lower "unloading" charges, are fully and plainly stated in its final report under the heading "General discussion and conclusions." (R. 23y-23cc, 286 I.C.C., pp. 139-142) We have in our Summary of Argmument, under the subheading "The Two

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Commission Reports" (pp. 26-27, *ante*), compared the grounds of decision in the two reports and shown that in its final decision the Commission reversed and abandoned the reasons and grounds of decision of the majority in the first report. We shall not repeat that discussion here but shall supplement it.

The foundation and keystone of the Commission's original decision was the conclusion of the majority that the "unloading" service was *an accessorial service.* On this fundamental premise the majority had ruled that disregard of the "benefits" derived by the railroads from their line-haul rates and from the use of the pier stations in New York was "justified", such matters not being "controlling". (R. 24q-24r, 272 I.C.C., pp. 662-663) Following two further hearings, the Commission in its final report reversed the earlier ruling that the "unloading" service is accessorial. The ruling is not repeated and the findings in the final report are that the service in question is *a delivery service.* Had the Commission adhered to the original first premise, the entire cost of the unloading service should, in logic, have been assessed against the shippers in addition to the line-haul rates. The abandonment and reversal of the original ruling is most clearly shown by the disapproval in the final report of the charges originally authorized. In the final report the Commission expressly states in justification of its final decision that "benefits accrue to respondents from the use of pier deliveries." (R. 23bb, 286 I.C.C., p. 141) Because of these "benefits" to the railroads and the non-accessorial character of the service, the Commission in its final report concluded "that the cost of unloading should be borne partly by the shippers and partly by the respondents." (R. 23z, 286 I.C.C., p. 140)

In conjunction with its original and erroneous holding that the service in question was accessorial, the Commission made the following statement (R. 24q, 272 I.C.C., p. 662):

> "For the purposes of this proceeding we are not convinced that adequate compensation for these unloading services is or should be included in the line-haul rates."

This statement immediately preceded in the same paragraph the Commission's original ruling that the service in question was accessorial in character. This statement concerning the line-haul rates is not to be found in the Commission's final report made on an "amplified" record following two further hearings. This view concerning the line-haul rates was obviously abandoned and reversed in reaching the final decision. In its final decision the Commission painstakingly set forth under the heading "General discussion and conclusions" the grounds and reasons for the final decision. That the statement concerning the line-haul rates found in the original report was without any basis in the evidence is readily shown by the fact that the railroads submitted no evidence concerning their line-haul rates or their inadequacy to compensate for performance of the unloading and delivery service. This subject is discussed in a separate chapter. The examiner in his report following the rehearing and further hearing stated (R. 100):

> "In the instant proceeding, respondents not only failed to prove that the through charges are reasonable, but have taken the position that the reasonableness of the line-haul rates is irrelevant."

The reversal of the grounds of decisions given in the first report is further shown by comparing the treatment there of the matter of team-track delivery in New York with the treatment accorded this subject in the final report. After reciting in the original report the claim of the protestants that "pier delivery is substituted for team-track delivery", the Commission stated that no studies of comparative costs have been made, but:

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"In any event it is not appropriate to consider these matters as affecting the costs, as such, of unloading at the piers." (R. 24o, 272 I.C.C., p. 660)

Following the oral argument on rehearing the Commission deemed this subject so important that instead of deciding the case the Commission issued a special "Notice" stating "the record is deficient in respect of certain evidence which seems to be important" and calling upon the railroads to produce at a further hearing evidence "to show the difference in costs to them of handling fruits and vegetables, in carloads, at piers on Manhattan Island as compared with the handling of carloads of fruits and vegetables at railroad team tracks on Manhattan Island and Jersey City, N. J." (R. 293) Evidence on this subject is described at length in the final report. (R. 23o-23r, 286 I.C.C., pp. 131-133)

The statement and conclusions found in the Commission's original report which were abandoned and reversed in the final decision constituted errors which had been forcefully brought to the Commission's attention in the many petitions for reopening and reconsideration filed by numerous parties. These petitions, filed in December, 1948, are listed at R. 292-293. Three of these petitions are included in the printed record. (R. 225, 241, 262) From these representative petitions it will be seen that errors of law had been committed by the Commission in its original report (1) in considering the unloading and delivery service as "accessorial"; (2) in failing to require the railroads to justify the added charge for delivery in the light of the compensation received by them under their line-haul rates; (3) in failing to recognize the pier station delivery in New York as a mere substitute delivery service more economical to perform than team-track delivery; and (4) that the unloading service is merely a part of the delivery service which the railroads are required to perform under their line-haul rates. (R. 225, 229, 230, 232, 235, 238, 245, 247-

249, 252, 253-254, 264-268). It was on basis of these petitions showing the errors in the original report that the Commission acted to reopen the proceeding for rehearing. (R. 292-293)

The Commission's Final Report Plainly Shows the Erroneous Basis of the Decision.

In the Summary of Argument, under the subheading "The Two Commission Reports" (pp. 27-31, *ante*), we discussed the grounds of the Commission's final decision which are fully and plainly set forth in the final report under the heading "General discussion and conclusions". (R. 23y-23cc, 286 I.C.C., pp. 139-142) We there showed that the reasons and grounds given are erroneous as a matter of law. We shall avoid repetition and merely summarize below the fundamental errors in the grounds advanced by the Commission for its final decision. They are:

1. Although the issue was squarely presented, the Commission ignored and disregarded the obligation of the railroads to make delivery under their line-haul rates.

2. Without determining or finding that the line-haul rates in issue (a) do not include delivery or (b) are inadequate to compensate the railroads for performing their customary obligation, the Commission authorized and approved the establishment of an extra charge in addition to the line-haul rates for the performance of the delivery service.

3. The Commission found "that the cost of unloading should be borne partly by the shippers and partly by the respondents" because "the present method of handling shipments through the pier stations is of benefit to both shippers (including consignees) and carriers." This ground, constituting the primary basis of the Commission's final decision, ignores the fundamental fact that the use of transportation and terminal facilities is always of benefit to both shippers and carriers. The shipper gets his goods

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transported to the place desired and the carrier benefits from the patronage of its facilities. The question here is not whether the shippers benefit but whether they have paid for the service and for the use of the terminal facilities. If the line-haul rates fully compensate the railroads for such use and for such delivery, the railroads are not entitled to an extra and duplicate charge however beneficial pier station delivery may be to the shipper.

4. The Commission excuses the failure of the railroads to provide team-track delivery facilities on Manhattan Island but ignores the obligation of the railroads where team-track delivery is not provided to provide an equivalent substitute delivery service under their line-haul rates, as held by this Court in *Interstate Com. Com.* v. *Atchison, T. & S. F. Ry. Co.*, 234 U.S. 294.

5. The Commission excuses the failure of the railroads to provide team tracks, but fails to apply the legal principle that the railroads are obligated under their line-haul rates to make delivery, either at team tracks or to provide an equivalent substitute delivery service. The mere general statement by the Commission that the railroads are under no obligation "to provide an excessive amount of terminal service," cannot and does not excuse the failure of the railroads to make delivery, even though team tracks be not provided therefor. There is no finding by the Commission that the method of delivery at the pier stations, including unloading, constitutes "an excessive amount of terminal service;" nor indeed could there be such a conclusion in the light of the Commission's positive findings that the service at the piers is for the purpose of "making delivery" and therefore merely a substitute for team-track delivery. This is particularly true when considered in the light of the Commission's other findings that the pier station delivery, including unloading, is more economical for the railroads than the team-track delivery would be and avoids heavy capital investments in team-track facilities.

6. Based on the grounds above referred to, the Commission erroneously states that the line-haul rates may be given only slight attention and that "the propriety of the separate unloading charge may be determined without an extensive showing with respect to the reasonableness of the line-haul rates." Its only statement concerning the line-haul rates is as follows: "The showing that the level of the rates to New York and Philadelphia is no higher than the rates to other consuming points where shippers unload or charges are assessed for unloading is of major importance in this respect." This reference to other communities where shippers unload or charges are assessed for unloading pointedly discloses the failure and refusal of the Commission to give effect to the obligation of the railroads to make delivery under their line-haul rates. At these other communities the railroads provide terminal delivery facilities at which the consignees are given an opportunity to unload their freight. At these other communities delivery is made under the line-haul rates. An additional charge for unloading is assessed only where the consignee chooses to request the railroads to perform that service *in addition to making delivery.*

The following supplementary comments should be made concerning the grounds of decision stated by the Commission in its final report under the heading "General discussion and conclusions":

The Commission states: "The respondents have been willing to perform the unloading without a separate charge until, in recent years, the cost thereof substantially increased." (R. 23z, 286 I.C.C., pp. 139-140) Increased expenses are no justification for excusing the railroads from performing their legal obligations under their line-haul rates. The carriers' line-haul rates have been increased 60 percent or more since 1947 to compensate the railroads for their increased expenses in performing transportation thereunder. In its final report herein the Commission makes reference to a 30 percent increase effective October

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6, 1947, which was authorized generally in all railroad rates and charges. (R. 23b, 286 I.C.C., p. 120) This increase was authorized in *Increased Freight Rates, 1947,* 269 I.C.C. 33; 270 I.C.C. 81; 270 I.C.C. 93; 270 I.C.C. 403. A further increase of approximately 10 percent was authorized in *Increased Freight Rates, 1948,* 272 I.C.C. 695; 276 I.C.C. 9; 279 I.C.C. 303. A still further increase of 15 percent was authorized in *Increased Freight Rates, 1951,* 280 I.C.C. 179; 281 I.C.C. 557; 284 I.C.C. 589; 289 I.C.C. 395. These increases constitute an aggregate increase of 64 percent. Some limitation was provided in these decisions as to the maximum increases which might be made in the line-haul rates on fresh fruits and vegetables but the aggregate increases in the line-haul rates on these commodities closely approach the maximum increases stated.

In addition to increases in revenue from increased line-haul rates, the carriers making delivery of the fruit and vegetable traffic also have available possible adjustments and increases in their divisions of such line-haul rates. Section 15(6) of the Act grants to each carrier participating in joint rates an adequate remedy for increasing its compensation if the present divisions are deemed inadequate fairly to compensate it for the services performed. Increased divisions on the fruit and vegetable traffic delivered at New York were obtained by the Erie Railroad in *Erie R. R. Co.* v. *A. & V. Ry. Co.,* 98 I.C.C. 268. Thus, if the delivering railroads are dissatisfied with their present divisions and feel that they are being inadequately compensated for the unloading and delivery service which they are performing under the line-haul rates, they may bring such proceedings under Section 15(6) at any time

The Commission states: "Physical conditions in and around New York which limit available space for the establishment and operation of railroad terminal facilities is a general community problem and obviously there should be some sharing between the carriers and their patrons of the burden of overcoming the existing difficulties if this

congested area is to be served by railroad transportation." (R. 23z, 286 I.C.C., p. 140) This is wholly beside the point. The shippers and receivers do not ask, and are not entitled to ask, for railroad rates which do not reasonably and adequately compensate the railroads for the delivery of freight in New York. The line-haul rates to New York, N. Y. have covered the unloading and delivery service for a great many years. The reasonableness of these line-haul rates for the services so long performed under them must be presumed to be reasonable and "their reasonableness is presumed to continue in the absence of a showing to the contrary." *Swift & Co.* v. *United States*, 343 U.S. 373, 383. Appellants merely contend that they *should not be charged twice for the same service.* In view of the presumed reasonableness of the line-haul rates for the services performed thereunder for 50 years, they are being charged twice for the same service unless it can be shown that the line-haul rates are inadequate fairly to compensate the railroads for these services. The railroads in failing to submit any evidence concerning their line-haul rates, wholly failed to show that the presumption of reasonableness should be overturned.

The Commission states "it is probable that continuance of the present charges will cause sufficient diversion of the traffic under consideration to team-track delivery, to require the construction of additional team-track facilities at considerable expense." (R. 23bb, 286 I.C.C., p. 141) Shippers are entitled under the line-haul rates to team-track delivery or an equivalent substitute delivery service. The fact that the shippers may divert their shipments from the pier stations and demand the team-track delivery to which they are plainly entitled cannot possibly excuse or justify the assessment of an additional delivery charge where the carriers have chosen to employ a substitute method of delivery. This is particularly true here where the method of delivery substituted by the railroads is more economical for them and avoids heavy capital investments in team-track facilities.

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Ignoring and disregarding throughout its "General discussion and conclusions" the legal obligation of the railroads to make delivery under their line-haul rates, the Commission does not cite or discuss the leading Commission cases in which this obligation has been enforced. These cases are cited by Commissioner Knudson in his dissenting opinion. (R. 23ff, 286 I.C.C., p. 144) Some of them are discussed herein at pages 32-37, *ante*. In lieu thereof, the Commission relies upon *Charges for Loading and Unloading Carload Freight*, 269 I.C.C. 25, which the Commission terms "the most pertinent of any of the cases cited." (R. 23aa, 286 I.C.C., p. 140-141) The citation of this case and primary reliance upon it merely illustrates further the Commission's failure and refusal to enforce in the present case the obligation of the railroads to make delivery under their line-haul rates. The cited case does not relate to a delivery service or an "unloading and delivery service". It relates to a service beyond the obligation of the railroads under their line-haul rates, namely, *an accessorial unloading service requested by the shipper or consignee in addition to delivery.* The unloading service there involved was performed in addition to the complete delivery service covered by the line-haul rates and was performed upon request of the shipper or receiver. Commissioner Knudson very clearly shows the fundamental difference between that case and the present case in his dissenting opinion herein. He said (R. 23ff-23gg, 286 I.C.C., p. 145):

> "In support of its conclusions the majority refers to *Charges for Loading and Unloading Carload Freight*, 269 I.C.C. 25. It was proposed by respondents therein to establish increased charges for certain accessorial services, including carload unloading, provided for by them at St. Louis, Mo., and other points in central territory. At those points delivery of carload freight was made in the usual manner at sidings or team tracks, the charge therefor being included in the through rate from point of origin. Respondents also provided in their tariffs that, *when requested,*

they would perform the carload unloading at certain points for 56 cents per ton when unloaded on team tracks and 69 cents when handled over freight-house platforms. They proposed to increase these charges to 94 cents. Division 2 found the proposed charges just and reasonable. That proceeding is not in point with the instant proceeding. There, unloading of the freight was not essential to delivery. It was an accessorial service performed upon request, the charge for which was separate and distinct from the through rate, which included the charge for siding or team-track delivery. The unloading charge, being separate from the through rate, could be increased without bringing the latter in issue. Here, the unloading at New York and Philadelphia is not an accessorial service. It is an essential part of delivery, published as such in respondents' tariffs, the charges for which are included in the through rates."

The Commission cites two other decisions which, it states, "tend to support our conclusions herein": *New England Coal & Coke Co.* v. *N. & W. Ry. Co.*, 33 I.C.C. 276, and *Loading and Unloading Carload Freight*, 101 I.C.C. 394.

In the *New England Coal case*, it had been *the established practice* of the railroads at Norfolk, Va., to assess on coal in addition to the line-haul rates a charge for "dumping" of the coal from the cars into the vessels. This dumping was accomplished by placing the car on tracks elevated above the vessel and by opening of the cars to allow the coal to fall down chutes into the vessel. In assailing this established dumping charge the shipper contended that the dumping was included in the line-haul rate. In that case the line-haul rate on coal dumped into vessels was $1.40 per ton whereas the line-haul rate on coal given team-track or siding delivery at the same destinations was $1.50 per ton. Thus the shipper could not claim he was "paying for team track delivery" but was not receiving it. He was paying a lower line-haul rate for a different type of service in connection with which there was an established additional dumping charge. The aggregate of the line-haul

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rate and dumping charge was less than the line-haul rate for team-track delivery.

Loading and Unloading Carload Freight involved a railroad proposal to discontinue the unloading of carload freight at certain cities not including New York or Philadelphia, at which such service had previously been performed without charge in addition to the line-haul rates and to assess an additional charge therefor if the service were requested by the shipper. In approving the assessment of the additional charges there involved, the Commission found that the railroads were providing team-track delivery under their line-haul rates and that the line-haul rates involved were reasonable for this *quantum* of service. It found that the loading and unloading services were in excess of the terminal service covered by the line-haul rates and, accordingly, that the separate added charge for the additional service was justified.

These cases are plainly inapplicable to the present situation in which the receivers are refused an opportunity to unload their freight and in which the unloading service is performed by the railroads as an integral part of a delivery service which the railroads have chosen to substitute for conventional team-track delivery. In all of the cited cases the shippers and receivers were given either team-track delivery or its equivalent, as required under the line-haul rates, and the added charge was for a service found to be not covered by the line-haul rates.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the District Court should be reversed and that the orders of the Interstate Commerce Commission should be enjoined, suspended, set aside and annulled, namely:

First, that portion of the order of May 7, 1952 authorizing and approving the establishment and maintenance by the railroads at New York, N. Y., and Philadelphia, Pa.,

of unloading charges on shipments of fruits and vegetables in addition to their line-haul rates, issued in I. & S. Docket 5500, *Unloading Charges on Fruits and Vegetables at New York and Philadelphia* (R. 25); and

Second, the order of December 15, 1952 ratifying and reaffirming the authorization and approval of the said unloading charges, issued in, and dismissing without hearing the complaints in, Docket 31105, *Florida Citrus Commission, et al.* v. *The Baltimore and Ohio R. Co., et al.,* and Docket 31106, *Florida Citrus Commission, et al.* v. *The Baltimore and Ohio R. Co., et al.* (R. 26)

Respectfully submitted,

M. W. WELLS,
MAGUIRE, VOORHIS & WELLS,
1007 Florida Bank Building,
P. O. Box 633,
Orlando, Florida.

Attorney for

Florida Citrus Commission,
Growers and Shippers League of Florida,
Chase and Company,
Nevins Fruit Company,
Dr. P. Phillips Cooperative,
Philadelphia Terminals Marketing Association,
The Auction Receivers of Philadelphia,
United Fresh Fruit and Vegetable Association,
Idaho Shippers Association, Inc.,
National Onion Association,
Western Growers Association,
Dan Storey, Jr.,
Max Feldbaum and Sons,
A. Cancelmo Company,
B. M. Young,
New York Fruit Auction Corporation,
United Fruit Buyers' Association,

JOHN F. DONELAN,
PRESTON B. KAVANAGH,
DICKSON R. LOOS,
707 Munsey Building,
Washington 4, D. C.

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WALTER HOFFMAN,
Balboa Building,
San Francisco, Calif.
Attorneys for

California Citrus League.
California Grape and Tree Fruit League.

SIDNEY GOLDSTEIN, *General Counsel,*
FRANCIS A. MULHERN,
111 Eighth Avenue,
New York 11, N. Y.

WILBUR LA ROE, JR.,
ARTHUR L. WINN, JR.,
SAMUEL H. MOERMAN,
Investment Building,
Washington 5, D. C.
Attorneys for

The Port of New York Authority.

ADRIAN P. BURKE,
Corporation Counsel,

JAMES J. THORNTON,
G. GARY SOUSA,
SIDNEY BRANDES,
Municipal Building,
New York, N. Y.
Attorneys for

City of New York.

EARL J. GRATZ,
DAVID B. FITZGERALD,
1900 Girard Trust Building,
Philadelphia, Pa.

T. EWING MONTGOMERY,
123 South Broad St.,
Philadelphia, Pa.
Of Counsel for:

Philadelphia Terminals Marketing Association.
The Auction Receivers of Philadelphia.
Dan Storey, Jr.,
Max Feldman and Sons.
A. Cancelmo Company.
B. M. Young.

WILMER A. HILL,
AMES, HILL & AMES,
Transportation Building,
Washington, D. C.
Of Counsel for:

United Fresh Fruit and Vegetable Association.
Idaho Shippers Association, Inc.,
National Onion Association.
Western Growers Association.

EDWARD I. KAPLAN,
280 Broadway,
New York, N. Y.

JULIUS BLUMENFELD,
320 Broadway,
New York, N. Y.
Of Counsel for:

New York Fruit Auction Corp.,
United Fruit Buyers' Assoc., Inc.

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APPENDIX

The following are the relevant provisions of the Interstate Commerce Act, as amended (24 Stat. 379, as amended; 49 U.S.C. Sec. 1, *et. seq.*):

SEC. 1(3) (a). "* * * The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * *" (49 U.S.C. Sec. 1(3) (a)).

SEC. 1(5) "All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful" (49 U.S.C. Supp. V Sec. 1(5)).

"SEC. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful" (49 U.S.C. sec. 2).

"SEC. 3(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association,

locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description" (49 U.S.C. Sec. 3 (1)).

SEC. 6(1) "That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part." (49 U.S.C. Sec. 6(1))

SEC. 6(7) "No carrier, unless otherwise provided by this part, shall engage or participate in the transportation

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of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs (49 U.S.C. Sec. 6 (7)).

Sec. 15 (6) "Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustmnt to be made in accordance therewith. In so prescribing and determing the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance

to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge" (49 U.S.C. Sec. 15 (6)).

SEC. 15 (7) "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to

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the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible" (49 U.S.C. Sec. 15 (7)).

SEC. 15a(2) "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service" (49 U.S.C. Sec. 15a (2)).